Supreme Court, U.S.
FILED

No. (1) 99 52 JUL 2 - 1999

OFFICE

IN THE

Supreme Court of the United States

HERB HALLMAN CHEVROLET, et. al.,

Petitioners,

–against–

DOROTHY NASH-HOLMES, et. al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the judicially created doctrine of absolute immunity insulates a state prosecutor from all judicial inquiry into the constitutionality of his conduct before an investigatory grand jury and for causing the arrest of an individual without probable cause; and whether, in deciding questions of immunity, the federal courts may disregard a state court's factual finding that there was no probable cause to support an arrest.

2. Whether it is consistent with the Seventh Amendment for federal courts to resolve disputed questions of material fact in favor of the defendants in order to grant summary judgment to defendants on the basis of absolute or qualified immunity.

LIST OF THE PARTIES TO THE PROCEEDING BELOW

PARTIES IN 97-15275

Petitioners (Plaintiffs-Appellants Below)

HERB HALLMAN CHEVROLET, INC., a Nevada Corporation[1]
JOHN P. STANKO

Respondents (Defendants-Appellees Below)

DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County
DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County
FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
WASHOE COUNTY, a political subdivision of the State of Nevada

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[1] Herb Hallman Chevrolet, Inc. has no parent company or subsidiary companies.

PARTIES IN 97-15323

Petitioners (Plaintiffs-Appellants Below)

JERRY VAN DER HOEVEN
JAMES BAYUS
STAN BONDICK
CRAIG CONRAD
TOM GEORGE
RON HALL
JOHN JULIAN
JUDY LIMON
DAN MAHONEY
EDWARD J. MATTS
RON SHERK
GREG STEWARD
ALEX VARGO
CLIFFORD SOUZA

Respondents (Defendants-Appellees Below)

DONALD COPPA, individually and in his official capacity as Assistant District Attorney for Washoe County
DOROTHY NASH-HOLMES, individually and in her official capacity as District Attorney for Washoe County
FRANK D. LANDES, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
JOHN J. LONG, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
MICHAEL NEVILLE, individually and in his official capacity as Investigator with the Washoe County Office of the District Attorney
WASHOE COUNTY, a political subdivision of the State of Nevada

CITY OF RENO, a municipal corporation
RICHARD C. KIRKLAND, individually and in his official capacity as Chief City of Reno Police Department
JAMES WESTON, individually and in his official capacity as Deputy Chief of the City of Reno Police Department

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The Opinion by the Court of Appeals for the Ninth Circuit is reported at 169 F.3d 636 (9th Cir. 1999), and is set forth in the Appendix at App. 1. The Orders denying the petitions for rehearing are unreported and are set forth in the Appendix at App. 21 and App. 23. The Opinions and Orders of the District Court for the District of Nevada are unreported, and are set forth in the Appendix at App. 25 and App. 37.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 3, 1999. A petition for rehearing and rehearing en banc was filed by plaintiffs-appellants and was denied by Order entered on April 16, 1999. A petition for rehearing was filed by defendants-appellees and was denied by Order entered on April 29, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

42 U.S.C. § 1983 provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

STATEMENT OF THE CASE

1. Procedural History

In July 1993, a Washoe County grand jury, after a year long investigation, convened and presided over by defendant-respondent Donald Coppa, the Chief Deputy District Attorney of Washoe County, returned an 81 count indictment charging plaintiff-petitioner Herb Hallman Chevrolet, Inc., a Chevrolet/Geo dealership in Reno, Nevada (the "dealership"), plaintiff-petitioner John P. Stanko, the owner of that dealership, and fifteen of the dealership's former and current employees (also plaintiffs-petitioners herein) with 409 separate felony

offenses. The District Attorney held a press conference and Stanko and his employees were quickly arrested.

Nearly a year later, before the criminal trial was scheduled to commence, a Washoe County Deputy District Attorney, with the approval of Coppa and defendant-respondent District Attorney Dorothy Nash-Holmes, after being directed by the Nevada state court to indicate where in the grand jury record there was any evidence to support the charges, voluntarily dismissed all of the charges against Stanko and the dealership (and most of the charges against the remaining employees), conceding that there was not even "slight or marginal evidence" to support them. Shortly thereafter, the state court, in a scathing 173 page opinion detailing repeated instances of gross prosecutorial abuse, dismissed the remaining charges.

Stanko and the dealership commenced an action, pursuant to 42 U.S.C. § 1983, in the United States District Court for the District of Nevada against the three district attorneys from Washoe County who had instituted the investigation and later conceded the absence of probable cause to support the arrest warrants; three District Attorney investigators; and Washoe County itself. Jurisdiction in the District Court was based on 28 U.S.C. § 1331 and 1343. Some time later, Stanko's employees filed a substantially similar action.

On August 26, 1996, the District Court granted partial summary judgment to all of the defendants in both cases on the ground that the defendants had absolute immunity for all conduct after the date when the investigative grand jury was impaneled, and qualified immunity for virtually all conduct before that date. Judgment was entered on January 13, 1997.

Petitioners filed timely notices of appeal. Jurisdiction in the Court of Appeals was based on 28 U.S.C. § 1291. On March 3, 1999, the Court of Appeals for the Ninth Circuit, which had

consolidated the two cases, affirmed the judgment of the District Court.

2. Statement of the Facts

In late 1990, a disgruntled customer of the dealership, Rick Wells, complained to the Reno Police Department that someone at the dealership had forged his name on a rebate assignment form, allowing the dealership to steal his $600.00 factory rebate. The Reno Police Department investigated and, in July, 1991, turned the matter over to the Washoe County District Attorney's office. Wells also filed a complaint with the Department of Motor Vehicles Bureau of Enforcement (the "DMV"), which conducted its own investigation. In November, 1991, the DMV closed its file, concluding that Wells had received credit for the rebate and communicating the result of its investigation to the police. (CR1-69, ex. 6, 7; RE 341, 371-75)

The DMV, with its expertise, realized that the dealership had handled the rebate in an appropriate fashion by deducting the rebate directly from the lease price and assigning it to the dealership, instead of setting the price without consideration of the rebate and then having the manufacturer transfer the rebate directly to the customer. Nevertheless, the District Attorney's office, unfamiliar with auto financing, decided to conduct a thorough investigation of the complaint. (RE 178, 371-72)

Stanko, in an effort to cooperate, turned over Wells' file, made his employees available for interviews, and provided the investigators with rebate information on twelve other customers. (CR1-73, ex. 8)

On January 14, 1992, Coppa, the Chief Deputy District Attorney, approved a search warrant (which was executed in full view of the media) for three months of the dealership's business records. The affidavit in support of the warrant, drafted by the

defendant investigators, and approved by Coppa, alleged that there was probable cause to believe that a salesman at the dealership had committed two crimes: obtaining money by false pretenses and engaging in deceptive trade practices. (RE 348, 354; CR1-73, ex. 8)

The affidavit also set forth that Wells was not advised of the rebate, that his signature on a rebate assignment form and power of attorney had been "confirmed" to be a forgery, and that documentation on a married couple, the Peases, customers who did not recall receiving a rebate, did not reflect that they had received a rebate in their transaction. The affidavit, however, did not inform the judicial officer of several other material facts that the defendants had learned during this investigation: that Wells had received credit for the rebate as part of his transaction, that he had a criminal record for vehicular fraud, that he had been trying to rescind his transaction with the dealership, that Wells' signature was a "simulated forgery" and the handwriting expert had not been able to link the forgery with anyone at the dealership or rule out Wells as the forger, and that the Peases, as well as the dealership's eleven other customers during this time period, had received credit for the rebate. (RE 342-47, 371-84; CR1-73, ex. 8, ex. 9)

On March 23, 1992, Coppa prepared another application for a search warrant, this one seeking a vast array of additional documents. (RE 356-69)

After investigating the dealership for over a year, and obtaining voluminous records, on July 8, 1992, Coppa began a year long grand jury investigation into the dealership's "business practices." Coppa did not identify for the grand jurors what crimes they were investigating. Instead, he announced at the opening session, and at each session thereafter, that the grand jury's purpose was to continue the "investigation" into the dealership's practices. (CR1-73, p. 4-5, ex. 2; RE 182, 301-03)

Nearly one year from the date this investigative grand jury was convened, on the night before the grand jury's term was set to expire, Coppa handed the grand jury a massive indictment containing 81 separate counts and charging 409 felony offenses, including charges of racketeering, against 16 separate defendants. By 8:20 a.m. the next morning, the grand jurors (most of whom had failed to attend a significant portion of the proceedings) returned the indictment. (RE 134, 262-65)

Armed with this indictment, Coppa prepared and obtained bench warrants for the arrest of Stanko and fifteen of his employees. District Attorney Holmes convened a press conference to announce the arrests. (CR1-67, ex. F)

The defendants moved to dismiss the indictment. The Nevada trial court held four days of hearings. (CR1-73, ex. 6; RE 168) During the hearings, the court asked the Deputy District Attorney, Gary Hatlestadt, to demonstrate where in the record there was evidence to support each of the counts against each of the defendants. In response to the court's questioning, Hatlestadt openly acknowledged that there was "not even slight or marginal evidence" to support the vast majority of the charges. Then, with Coppa's and Holmes' approval, Hatlestadt stipulated to the dismissal of 315 of the 409 charges, including all of the charges against Stanko and the dealership.[1] (RE 134-37, 170-71, 268-70, 278, 327-28) As the state court later put it, "One mistaken indictment is too many. 318 mistaken indictments is a travesty." (RE 278)

The state court reviewed some 3,350 pages of grand jury testimony, and 144 grand jury exhibits. Then, in a detailed opinion that found that the grand jury was "investigative" in nature (RE 182-83, 301-02), the state court dismissed the

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[1] Three other charges had earlier been dismissed. (RE 170)

indictment in its entirety. Although there were many grounds for the dismissal, including gross prosecutorial abuse of the grand jury function and deliberate withholding of exculpatory evidence, the state court repeatedly noted that there was not even slight or marginal evidence to support the remaining charges. (RE 180, 278, 309, 316-24) The state court expressed "shock[] that these defendants [plaintiffs-petitioners] have been subjected to criminal charges, public vilification, and enormous economic loss based upon a proceeding so flawed and unfair." (RE 169-70, 180, 278, 309, 316-24)

No further criminal proceedings were ever brought against Stanko, the dealership, or any of the employees.

3. The Federal Court Proceedings

After being completely vindicated in state court, Stanko and fifteen of his employees -- who were investigated for three years and arrested without probable cause, all under the glare of the media -- sought to hold the prosecutors and the investigators liable for this violation of their civil rights. But the federal courts presiding over their constitutional claims utterly ignored the state court proceedings -- both the prosecutor's concession as to the lack of probable cause for 318 of 409 charges, and the state court's findings: (1) that this was an investigative grand jury; (2) that the prosecutors had abused the grand jury process; and (3) that there was insufficient evidence to support the charges that were not voluntarily dismissed. Instead, on a motion for summary judgment, after resolving all factual disputes in favor of the defendants, the District Court found that the prosecutors had probable cause to arrest the plaintiffs from the moment the grand jury was impaneled. (App. 39-40) The Ninth Circuit affirmed this finding. Tossing aside the state court ruling with the disdainful note that it did not "endorse [its] holding" (App. 18), the Ninth Circuit, reading the evidence in the light most favorable to the defendants, held that the defendants were

absolutely immune from suit because, in the Ninth Circuit's view, there was probable cause to believe that the plaintiffs had committed, not the crimes with which they were charged, but unspecified and unidentified "crimes under Nevada law." (App. 15)

The Ninth Circuit, again affirming the District Court, also found, reading the evidence in the light most favorable to the defendants and resolving all factual disputes in defendants' favor, that the defendants had qualified immunity from suit from all claims arising out of the allegedly illegal search and seizure of the dealership's records. (App. 10-13)

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE AMBIGUITY IN THE LAW AS TO WHETHER PROSECUTORS WHO CONVENE AN INVESTIGATIVE GRAND JURY ARE ABSOLUTELY IMMUNE FROM SUIT BEFORE THEY HAVE PROBABLE CAUSE TO MAKE AN ARREST, AND TO DECIDE THE RELATED AND IMPORTANT QUESTION OF WHETHER A FEDERAL COURT CAN DISREGARD STATE PROCEEDINGS THAT ESTABLISH THE ABSENCE OF PROBABLE CAUSE

It is not unusual for federal civil rights cases to be brought after a state court has had a chance to comment on or review the conduct of the state officials who have allegedly violated the plaintiff's constitutional rights. Ordinarily, federal courts, in the interest of comity, pay attention to what the state court has said, and even defer to factual findings that are not clearly erroneous. 28 U.S.C. § 2254. See also Thompson v. Keohane, 516 U.S. 99 (1995). But, as this case amply demonstrates, in the civil rights area, when addressing questions

of immunity, the federal courts apparently do not believe they owe the same degree of deference, or indeed any deference, to a state court's factual findings that state officials engaged in gross improprieties before an investigative grand jury and that there was no probable cause to support the mass arrests of sixteen individuals.

This Petition raises important questions not only about the breadth of the judicially created doctrine of prosecutorial immunity, but also about the nature of federal-state relations. In Buckley v. Fitzsimmons, 509 U.S. 259 (1993), this Court held that a prosecutor does not have absolute immunity for investigative functions, even if an investigation is run through the auspices of a grand jury, and does not act as an advocate before there is probable cause to have someone arrested. This Petition asks this Court to clarify that holding. The Petition also asks this Court to determine whether, in deciding immunity questions, it is appropriate for a federal court to disregard entirely proceedings in the state court that established the absence of probable cause. Finally, the Petition questions whether the federal courts may construct "probable cause in the abstract" for crimes never spelled out either in the indictment or the arrest warrant, and whether that abstract "probable cause" can then become the justification for absolutely immunizing the state officials responsible for the arrest.

1. Clarification Is Needed On The Question Of Whether A Prosecutor Is Acting As An Advocate In Connection With His Conduct Before An Investigative Grand Jury.

42 U.S.C. § 1983 provides that "every person" who acts under color of state law to deprive another person of "any rights, privileges or immunities secured by the Constitution and laws," shall be liable in damages. An arrest without probable cause violates the Fourth Amendment and gives rise to a claim for

damages under Section 1983. See, e.g., Knox v. Southwest Airlines, 124 F.3d 1103, 1107 (9th Cir. 1997).

Section 1983 is expansive, and, on its face, provides for no immunities. Nevertheless, this Court has held that the statute generally contemplates at least some of the immunities traditionally recognized at common law. Imbler v. Pachtman, 424 U.S. 409, 418-19 (1976); Malley v. Briggs, 475 U.S. 335, 340 (1986).[2] However, this Court has also stressed that the courts must be "quite sparing" in recognizing claims to absolute immunity. Forrester v. White, 484 U.S. 219, 224 (1988); Buckley v. Fitzsimmons, 509 U.S. 259, 269 (1983). The "role [of the courts] is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice." Malley, 475 U.S. at 342.

This Court has adopted a "functional" approach to determining whether a prosecutor is absolutely immune from suit, that looks to the "nature of the function performed, not the identity of the actor who performed it." Forrester, 484 U.S. at 229. Under this approach, a prosecutor is absolutely protected for conduct relating to "initiating a prosecution and ... presenting the State's case," provided such action is "intimately associated with the judicial phase of the criminal process," but has only qualified immunity when "engaged in certain investigative activities." Imbler, 424 U.S. at 430-31.

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[2] In fact, it is not entirely clear that prosecutors enjoyed absolute immunity at common law for prosecutions commenced maliciously and without probable cause. See Note, Prosecutorial Immunity: Imbler, Burns and Now Buckley v. Fitzsimmons, The Supreme Court's Attempt To Provide Guidance In A Difficult Area, 1994 B.Y.U.L. Rev. 663, 665, citing Newell, Malicious Prosecution, False Imprisonment And The Abuse Of Legal Process (1892).

Applying this functional approach, the Court has restricted the prosecutorial activities which are absolutely immune from suit. The Court has held that a prosecutor enjoys only qualified immunity for giving legal advice to the police. Burns v. Reed, 500 U.S. 478 (1991). The Court has also held that a prosecutor is not absolutely shielded from suit for a claim based on the fabrication of evidence later introduced to an investigatory grand jury, in part, because, in the language most critical to this Petition, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have any one arrested." Buckley, 509 U.S. at 274. And more recently, the Court held that a prosecutor is not accorded absolute immunity for providing sworn testimony in support of an arrest warrant. Kalina v. Fletcher, 118 S. Ct. 502 (1997).

Although this Court has followed its own admonition to be sparing in the granting of absolute immunity, the standards for determining when a prosecutor is acting as an advocate and when he is acting as an investigator are anything but clear. Buckley itself contains internally inconsistent language, stating that there is no absolute immunity before there is probable cause to have someone arrested, but at the same time suggesting that there is absolute immunity even absent probable cause, if the grand jury has returned an indictment. 509 U.S. at 274, and n.5. Moreover, while the Court recognized that a grand jury may serve two functions -- that it may be convened to "conduct a more thorough investigation of the crime" or it may be convened "to return an indictment against a suspect when there was already probable cause to arrest," Id. at 275, the Court did not make clear whether a prosecutor who participates in a grand jury investigation is acting as advocate or an investigator.

The lower courts have grappled with how to deal with what even this Court acknowledged was a "difficult" question. Imbler, 424 U.S. at 431, n.33. A few courts, carefully parsing the plaintiff's claims, have recognized that the mere institution of

grand jury proceedings does not automatically convert a prosecutor into an advocate. See, e.g. Moore v. Valder, 65 F.3d 189 (D.C. Cir. 1995), cert. denied, 519 U.S. 820 (1996) (holding that prosecutor had absolute immunity for presenting misleading testimony to grand jury, but only qualified immunity for claim that he intimidated witnesses into changing their testimony); Hill v. City of New York, 45 F.3d 653 (2d Cir. 1995) (no absolute immunity for causing the defendant's arrest without probable cause or for falsifying videotaped evidence later introduced before the grand jury). But, other courts, like the Ninth Circuit here, have viewed the institution of grand jury proceedings -- regardless of the whether, as the state court found here, the grand jury was functioning as an investigative body -- as a bright line, insulating the prosecutor from all liability even if the prosecutor is using the grand jury as the functional equivalent of citizen police. See, e.g., Mastroianni v. Bowers, 173 F.3d 1363 (11th Cir. 1999) (holding that prosecutor could not be held liable for any actions that took place after "initiation of the grand jury proceeding"); Jones v. Cannon, 1999 WL 292673 (11th Cir. 1999) (grand jury indictment insulates defendants from all liability based on false arrest claim); Smith v. Gribetz, 958 F. Supp. 145 (S.D.N.Y. 1997) (presentation of evidence to a special grand jury to investigate wrongdoing at utility absolutely insulated defendant district attorney since he intended to indict the plaintiff).

The case law is anything but consistent. This Court itself has written about the unique position that the grand jury plays in our criminal justice system -- that, in theory, it does not function as a branch of any of the institutions of government, but as an entirely separate entity with power to investigate on merely a suspicion of wrongdoing. United States v. Williams, 504 U.S. 36, 47-50 (1992). See also United States v. Dionisio, 410 U.S. 1, 16 (1973) (the Fifth Amendment presupposes that the grand jury is an investigative body acting independently of the prosecutor or the judge).

In effect, because of confusion over what constitutes an investigative function once a grand jury has been convened, a prosecutor can insulate himself from all judicial inquiry into his conduct by the simple expedient of convening a grand jury and then using the grand jurors as quasi-investigators. Then, by obtaining an indictment (which, as the case demonstrates, can be accomplished by simply handing the grand jurors a document for them to sign), the prosecutors can cause the public arrests of the suspects, without probable cause, and still be protected by absolute immunity.

That does not appear to be what this Court intended. In Buckley, this Court noted that "a prosecutor may not shield his investigative work with the aegis of absolute immunity merely because, after a suspect is eventually arrested, indicted, and tried, that work may be retrospectively described as 'preparation' for a possible trial." Buckley, 509 U.S. at 276. But, unless this Court further explains how the lower courts are to evaluate a prosecutor's function and determine whether a prosecutor who has convened a grand jury to conduct an investigation is acting as an investigator or as an advocate, it is likely that the decisions will continue to be inconsistent, incomprehensible, and as this case seems to suggests, outcome determinative.

2. Clarification Is Needed On Whether A Prosecutor Is Ever Entitled To Absolute Immunity Before There Is Probable Cause To Have Someone Arrested And The Degree Of Deference Owed To State Court Determinations On The Absence Of Probable Cause.

This Court should also clarify what it meant in Buckley when it said that a prosecutor is not acting as an advocate before there is probable cause to have someone arrested. While the Court seemed to imply that a prosecutor always functions as a police officer when he secures an arrest warrant without probable cause and is protected then like investigators, by the doctrine of

qualified immunity, it is unclear whether a prosecutor who prepares judicial papers in order to effect an arrest without probable cause, but who deliberately falsifies evidence or is motivated purely by malice, is nonetheless insulated from suit because he is performing a "lawyer's" function. This case presents the Court with a perfect opportunity to address that question.

In connection with that inquiry, this Court should address the level of deference the federal courts should grant to the state courts if they have first examined the circumstances that led to the arrest and have found the absence of probable cause. In this case, during a lengthy hearing, in response to the state court's inquiry, the prosecutor explicitly admitted that there was no probable cause to support any of the charges against Stanko, the dealership, or the majority of the employees. And, the state court itself dismissed the remaining charges against the remaining employees after explicitly noting that it had "serious concerns about the sufficiency of the evidence" and "serious doubts whether there is even slight or marginal evidence to support" those charges. (RE 180, 278, 309, 316-24)

In any other context, these state court proceedings would be entitled to deference. After all, it is the state court that thoroughly reviewed all 3,350 pages of grand jury testimony, and heard four days of argument, and it is the state court that was most likely to appreciate whether the state authorized grand jury was functioning as an investigative body and whether there was any evidence to support the crimes charged in the indictment. But rather than defer to the state court, the Ninth Circuit not only held that it was not "bound by the [prosecutor's] characterization of the facts"(meaning his concession in open court that there was no probable cause to support the charges) (App. 15-16), but also held that, because the doctrine of collateral estoppel did not technically preclude relitigation of the issue, it could choose,

without further explanation, to disregard entirely the state court's findings. (App. 16)

There is a delicate relationship between our state and federal judicial systems, particularly in the criminal justice area, where federal courts are often asked to rule on the propriety of state court decisions. In the interests of comity, the federal courts generally respect state court rulings, particularly factually based rulings, that are not clearly erroneous. The determination of probable cause is an "objective (albeit fact specific) question." Anderson v. Creighton, 483 U.S. 635, 641 (1987). This Court should grant review in this case to address whether, in a federal civil rights action, similar deference is owed to a state court's factual rulings criticizing its own governmental officials and finding that there is no probable cause to support an arrest.

Finally, perhaps recognizing that, on this record, it could not hold that there was probable cause to support the crimes with which the plaintiffs were actually charged, the Ninth Circuit did something far worse: it "found" that there was probable cause to believe that the plaintiffs had committed some other unidentified and uncharged "crimes under Nevada law." (App. 15)

The Ninth Circuit's decision is both unprecedented and dangerous. It creates a concept of "probable cause in the abstract." A prosecutor no longer need show that there is probable cause to support the actual charges stated in the arrest warrant. He can arrest someone for a crime for which there is no probable cause and then justify what appears to be an unconstitutional arrest by theorizing that there might be other crimes for which there was probable cause. That is a notion completely alien to our criminal justice system and to what the Fourth Amendment demands.

If the Ninth Circuit view is correct, and is adopted by other federal courts, there is no Fourth Amendment violation if

a prosecutor maliciously arrests someone without probable cause and publicly convenes a press conference (as in this case) announcing the arrest, if he later speculates that there might have been probable cause to arrest the individual for some other, perhaps unrelated and lesser, crime. The individual, like the plaintiffs in this case, whose reputation may well be permanently ruined, is left with no forum in which to defend himself against the accusation that he committed some unidentified crime.

The rationale of the Ninth Circuit, in effect, allows a federal court to create a theoretical version of what should have taken place, but did not, in order to protect even the most incompetent or corrupt state officials. The protection afforded by the civil rights statutes, indeed the entire purpose of the civil rights statutes, is undercut by this judicial short-circuiting of the probable cause requirement.

The devastating impact of this approach to the Fourth Amendment is well illustrated in this case. Here, sixteen individuals were charged with hundreds of counts of racketeering, and were arrested for these highly inflammatory crimes only after the District Attorney convened a press conference to publicize the indictments and forthcoming arrests. When it came time to go to trial, the prosecutors conceded that they did not even have slight or marginal evidence to support the vast majority of the charges. The possibility that a few of the salesmen (and the Ninth Circuit did not bother to distinguish among the plaintiffs) may have committed some impropriety does not remedy the wrong done to those improperly branded as racketeers and, if the civil rights laws are to have any teeth, should not provide a basis for immunizing the prosecutors and their investigators from all judicial inquiry into their conduct. Mass arrests without probable cause cannot be permitted to become the constitutional norm.

The lower courts are plainly grappling with questions of prosecutorial immunity and how to interpret this Court's complex decisions in this area. This case provides an opportunity for this Court to address those questions and clarify the level of immunity that should be accorded a prosecutor who convenes an investigative grand jury and then effectuates arrests without probable cause.

II. CERTIORARI SHOULD BE GRANTED TO DECIDE THE IMPORTANT QUESTION OF WHETHER THE SEVENTH AMENDMENT PRECLUDES A COURT FROM GRANTING SUMMARY JUDGMENT, EVEN ON A QUESTION OF IMMUNITY, WHEN THERE ARE MATERIAL FACTS IN DISPUTE

"In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982). Nevertheless, recognizing that there are competing policy concerns, this Court has strengthened the doctrine of qualified immunity so that it provides protection to "all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341 (1986). This Court has also made it clear that questions of immunity should, whenever possible, be determined at the earliest possible stages of litigation. Anderson v. Creighton, 483 U.S. 635, 645 n.6 (1987).

But this Court has not had an opportunity to address whether the policy reasons for encouraging summary judgment on the legal issues that underlie most immunity questions also means that the lower courts should abandon the traditional rules that apply to summary judgment motions,[3] or whether the

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[3] Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment may be granted only if the

Seventh Amendment to the Constitution, which protects the right to a jury trial in civil actions, precludes summary judgment when there are factual issues in dispute.

In this case, plaintiffs alleged that the affidavit in support of the first search warrant was deliberately misleading. The plaintiffs claimed, with strong legal support, that a government official cannot hide behind the shield of immunity when he submits an affidavit that contains statements that are either knowingly or recklessly false and the affidavit contains insufficient truthful allegations to support a finding of probable cause. See, e.g., Hervey v. Estes, 65 F.3d 784 (9th Cir. 1995).

On a summary judgment motion, plaintiffs' factual allegations about the information that was deliberately omitted from the affidavit, and that rendered the affidavit materially misleading, should have been taken as true. Among those allegations -- all of which were supported by substantial testimony and/or documentary evidence -- were claims that the following material information was omitted from the affidavit: that Wells, the complainant, had received credit for his rebate; that he had a criminal record for committing fraud in connection with a vehicle transaction; that the Department of Motor Vehicles Bureau of Enforcement had reviewed the transaction and found that it had been handled properly; that Wells's signature was a "simulated" forgery, which meant that the expert could not identity anyone at the dealership as the forger or even rule out Wells, who had been trying to rescind the transaction, as the source of the forgery; and that the twelve other customers whose transactions involved rebates all received credit for their rebates, including the Peases.

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moving party's submission demonstrates that "there is no genuine issue as to any material fact."

Had traditional rules governing summary judgment been applied, the existence of these factual allegations, supported by proof, would have precluded the grant of summary judgment to the defendants. "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). As this Court has made clear:

> Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge....The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255.

That did not happen here. The Ninth Circuit repeatedly decided factual issues by accepting the defendants' challenged version of the events. Virtually every fact relied on by the Ninth Circuit to support its analysis was disputed. By way of example: (1) The Ninth Circuit stated that the record "suggest[ed]" that Wells never received his rebate. (App. 11) That was disputed and was demonstrably untrue. (2) The Ninth Circuit stated that the Peases did not receive credit for their rebate. (App. 7-8) That was disputed. Plaintiffs introduced evidence to demonstrate that the Peases had signed the rebate over to the dealership and had received credit for it. (3) The Ninth Circuit stated that the handwriting expert found that was "no basis for identifying [Wells] as the writer." (App. 11-12) That was disputed; indeed, the expert testified that he could not rule out Wells as the forger. (4) The Ninth Circuit stated that the DMV investigator would have reopened the investigation had he known of the forgery. (App. 12) That was disputed. In fact, the DMV investigator testified that he prepared his finding already knowing that the

"signature on the rebate form was irregular." (RE 383) (5) The Ninth Circuit stated that there were other forgeries. (App. 15) That was disputed. In fact, one of the defendants admitted that, after seizing 151 files, the defendants discovered a signed rebate assignment form in every file in which there was a rebate and that there was no evidence that any of these documents were forged.

The Seventh Amendment guarantees federal civil litigants a right to have a jury resolve factual disputes. There is little question that had this summary judgment involved anything but an immunity issue, a court would deny summary judgment since there were an extraordinary number of material facts in dispute. But, perhaps because of this Court's suggestion that immunity questions be determined on summary judgment whenever possible, the Ninth Circuit decided that it could accept the defendants' version of the facts since that version, and only that version, would provide a legal basis for the grant of qualified immunity.

Without reading the record on appeal in every summary judgment case involving a question of immunity, it is impossible to ascertain whether the type of judicial inquiry conducted by the Ninth Circuit in this case is routine throughout the federal system. The public cannot realistically check whether an appellate court is resolving factual disputes in the civil rights area by reading the facts in the light most favorable to the government officials seeking immunity. The only check -- and the only way that the civil rights statutes can survive the ever expanding, judicially created immunities that limit their protections -- is for this Court to intervene in a case such as this one, where the abuse of the summary judgment device is so palpable, and instruct the lower courts that, even when facing questions of governmental immunities, the Seventh Amendment precludes summary judgment when there are factual issues in

dispute and prohibits a court from determining the facts in a manner that favors the party seeking to avoid a jury trial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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